



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-1735

THE FABSTEEL COMPANY OF LOUISIANA,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Andrew C. Partee
Walter W. Christy
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, LA 70160
Telephone: 504/524-4162
Counsel for the Fabsteel
Company of Louisiana

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement Of The Case	4
Reasons For Granting The Writ	8
The Decision Below Is In Conflict With The Decisions Of This Court	8
Conclusion	15

TABLE OF AUTHORITIES

Golden State Bottling Co. v. NLRB, 414 U.S. 168, 183	9,10,12
Howard Johnson Co. v. Hotel Employees, 417 U.S. 49 (1974)	9
Mosher Steel Co., 220 NLRB 336	5
Mosher Steel Co., 226 NLRB 1163	5
NLRB v. Burns International Security Serv- ices, 406 U.S. 272 (1972)	8,9,10,14
Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 275	12

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

THE FABSTEEL COMPANY OF LOUISIANA,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, The Fabsteel Company of Louisiana,
prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on February 1, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix 48a-65a) is not yet officially reported. The National Labor

Relations Board's decision and order is reported at 231 NLRB 372 (Appendix 46a-48a).

JURISDICTION

The judgment (Appendix 65a-66a) of the Court of Appeals for the Fifth Circuit was entered on February 1, 1979. An extension of time to May 17, 1979 was granted by this Court to permit the filing of this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the National Labor Relations Board abuse its authority in denying a successor employer the right to select its own employees by requiring it to remedy a predecessor's unfair labor practices by hiring, at the time of purchase, unreinstated unfair labor practice strikers of its predecessor?

2. May the National Labor Relations Board alter the composition of a bargaining unit lawfully hired by a successor employer, thereby destroy an existing good faith doubt of a union's majority, and require bargaining by the successor in the altered unit composed exclusively of employees of the predecessor employer?

STATUTES INVOLVED

Sections 8(a)(1) and (5) of the National Labor

Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158), provide:

Sec. 8.(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

For the convenience of the Court, a portion of Section 9(a) of the same Act (61 Stat. 143, 29 U.S.C. 159) is also herein set forth:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives . . .

Section 10(c) of the Act (61 Stat. 146, 29 U.S.C. 160) provides, in pertinent part, as follows:

... If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the com-

plaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act: *Provided, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . .*

STATEMENT OF THE CASE

This case arises in a factual situation not atypical in the current American industrial scene — the sale of a plant. The issue is the extent to which any unremedied unfair labor practices of the selling company inhibit the right of the purchaser to select its own employees and the right of such employees to designate their collective bargaining representative.

Petitioner (herein called "Fabsteel") purchased a plant located in Shreveport, Louisiana from Mosher Steel Company (herein called "Mosher") in December, 1975. The employees of Mosher were represented by United Steelworkers of America, AFL-CIO (herein called the "Union") in a unit consisting of all seven

plants of the company. The employees in the seven plants engaged in a strike commencing on July 22, 1974. In subsequent proceedings, the National Labor Relations Board concluded that the strike had been caused and prolonged by unfair labor practices committed by Mosher.¹ The strike concluded on May 12, 1975 when the Union made an unconditional request for reinstatement of the striking employees.

At the time the strike commenced, there were sixty-seven (67) employees in that part of the bargaining unit located in Shreveport. Sixty-five (65) of these employees struck. During the strike period (July 22, 1974 to May 12, 1975) Mosher hired approximately 30 new employees and, during the same period, twenty-one (21) or more striking employees returned to work at the plant. Between May 12, 1975 and December 31, 1975, seven (7) additional Shreveport strikers were recalled by Mosher. Five (5) strikers were refused reinstatement on grounds of misconduct. The Board held, in subsequent proceedings, that the misconduct of two of them was insufficient to forfeit their right to reinstatement.²

By contract dated December 10, 1975, Fabsteel agreed to purchase certain assets of Mosher in Shreveport. These included real property, improvements, production and vehicular equipment, raw materials

¹ Mosher Steel Company, 220 NLRB 336.

² Mosher Steel Company, 226 NLRB 1163.

and inventory. There was no purchase of accounts receivable, trade assets or good will.

Fabsteel purchased with knowledge of the outstanding order of the Board against Mosher. Said decision and order were then pending review in the United States Court of Appeals for the Fifth Circuit. The decision of the Fifth Circuit issued in May, 1976.³ The agreement between Fabsteel and Mosher provided that Mosher would indemnify Fabsteel against any and all costs or damages resulting from any claims asserted before a governmental agency alleging unfair labor practices of Mosher, including backpay, fines and/or costs relating to the reinstatement of Mosher employees. The agreement further provided that Mosher would offer reinstatement to such individuals at one of its facilities, paying reasonable expenses of transportation of an employee, his family and household goods.

Informed of the pending sale, the Union requested Fabsteel to recognize the Union and to reinstate strikers not yet recalled by Mosher. On January 5, 1976, Fabsteel declined asserting that it was not operating as a successor to Mosher, that it was not responsible for remedying its unfair labor practices, and expressed doubt of the Union's majority status.

On December 31, 1975, Fabsteel hired all of the Shreveport employees then on the payroll of Mosher

³ *Mosher Steel Company v. NLRB*, 532 F.2d 1374 (5th Cir., 1976).

and commenced operations on January 5, 1976. There were fifty-six (56) employees in production and maintenance classifications. Seven (7) had been strikers for its full term; twenty-one (21) had abandoned the strike and returned to work; and twenty-eight (28) were either non-strikers or replacements hired during the strike.

The decision below concluded that Fabsteel must remedy the unfair labor practices of Mosher as of the time of purchase and directed the "reinstatement" of twenty-two (22) Mosher strikers, requiring backpay from January 1, 1976. Notwithstanding that approximately 40% of the employees hired by Fabsteel were thereby displaced, the Court below concluded that a proper balance between conflicting legitimate interests of the *bona fide* successor, the public, and the affected employees had been achieved. The Court further concluded that, considering the unit as amended by the reinstatement order, Fabsteel no longer had a good faith basis to doubt the Union's majority status. Thus, whether the unit be viewed as excluding strike replacements actually hired by Fabsteel, or whether it be viewed as augmented by the strikers, the compulsory inclusion of twenty-two (22) Union adherents obviated any good faith doubt warranting a refusal of recognition.

REASONS FOR GRANTING THE WRIT

The Decision Below is in Conflict with the Decisions of this Court.

The Act does not inhibit an employer's right to select its own employees provided that it not discriminate on the basis of Union membership or activity. The decision below subordinates the right to hire of a successor employer to the obligation of its predecessor to remedy unfair labor practices. It thereby converts this obligation into a charge upon the enterprise — in the nature of a lien — to which any purchase is subject. The Board thus intrudes into the substantive terms of the transfer and requires, as a condition of purchase, a simultaneous remedy of unfair labor practices.

This Court has considered a variety of duties sought to be imposed upon an employer which purchases substantial assets of a predecessor and continues, without interruption or substantial change, the former business. In all of its decisions, this Court has maintained the right of a successor to set the initial terms under which it will operate, including the selection of its initial employee complement. In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), the Court refused to bind a new employer to a pre-existing collective bargaining agreement but required recognition of the Union of the predecessor's employees in the absence of a good faith doubt of its majority status. The Court, in *Burns*, *Ibid.*, at 280, n. 5, held that there was no

obligation by the purchaser to hire any of the predecessor's employees. Indeed, interference with the right to hire its own work force was a factor militating against compulsory observance of the contract because otherwise *Burns* "would not have been free to replace Wackenhut's guards with its own except as the contract permitted." *Ibid.*, at 288. The Court made clear that the bargaining duty of the successor matured only after it had selected its work force. *Ibid.*, at 295.

This Court again protected the right of a successor employer to select its own employees in *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 49 (1974). A union representing the predecessor's employees sought to enforce the duty to arbitrate upon a successor employer which had hired a minority of such employees. The issue which the union sought to arbitrate was the obligation to hire predecessor employees. The Court considered the action to be an attempt to avoid the *Burns* decision which established the right of a successor not to hire any employees of the predecessor and held that the "Union's effort to circumvent this holding by asserting its claims in a Section 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted." *Ibid.*, at 262.

Although the Court upheld the authority of the Board, in appropriate circumstances, to remedy a predecessor's unfair labor practices through a successor, it specifically stated that "we in no way qualify the *Burns* holdings." *Golden State Bottling Co. v.*

NLRB, 414 U.S. 168, 183. The Court observed that, in a situation similar to the case at bar, a succeeding employer would not be held responsible for all unremedied unfair labor practices:

A purchasing company cannot be obligated to carry out under § 10(c), every outstanding and unsatisfied order of the Board. For example, because the purchaser is not obligated by the Act to hire any of the predecessor's employees, see *NLRB v. Burns International Security Services, Inc.*, *supra*, at 280, n. 5, the purchaser, if it does not hire any or a majority of those employees, will not be bound by an outstanding order to bargain issued by the Board against the predecessor nor by any order tied to the continuance of the bargaining agent in the unit it involves. *Id.*, at 280-281.

The decision below ignores the teaching of *Burns* that the obligations of a successor mature only at that point when it has selected its work force. *Supra* at 295. It required Fabsteel to *decline* strike replacements in the actual work force and to *substitute* unreinstated strikers as part of its initial employee complement.

Although the Court below (Appendix 55a) specifically abjured a mechanical two-step approach to impose obligations upon a successor, it enforced a Board order based upon such simplistic and artificial

reasoning. The Board made an initial determination that Fabsteel was a successor because, among other factors, it hired all of Mosher's employee complement. The Board accordingly imposed all of Mosher's obligations upon Fabsteel, including the requirement that it displace some of the employees whose hiring underpinned the conclusion of successorship. This Court considers such an "artificial division between these questions" to be neither helpful nor appropriate. Whether or not a company is a successor is "not meaningful in the abstract." 417 U.S. at 262, n. 9. The proper standard was articulated by the Court:

... but the real question in each of these 'successorship' cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative. The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. (Citations omitted.) *Id.*

Applying the principle of balancing conflicting interests, the Court declined to impose a duty to arbitrate upon the new employer concluding that "[T]his holding is compelled, in our view, if the protection afforded employee interests in a change of ownership by Wiley is *to be reconciled* with the new employer's right to operate the enterprise with his own independent labor force." (Emphasis supplied.) *Ibid.*, at p. 264.

The controlling doctrine is the same when applied to the duty of a new employer to remedy unfair labor practices. It involves "striking a balance between the conflicting legitimate interests of the *bona fide* successor, the public, and the affected employee." *Golden State Bottling Co. v. NLRB*, 414 U.S. at 181. The decision below balanced no interests; it assumed as paramount the right of reinstatement of the strikers. It did not even discuss the right of a purchasing employer to select its own employees. It subordinated the rights of employees subject to displacement by the decision, rendering their vulnerability to displacement a part of the sales transaction. It bypassed an existing remedy available against the predecessor employer and the continuing existence of the bargaining unit of which the strikers had been a part. Available at all times was the remedy which this Court has suggested in a plant closing situation, utilized in runaway shops or temporary closings; that is, to "order reinstatement of the discharged employees in the other parts of the business." *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263, 275. The decision below thereby exculpates the

perpetrator of unfair labor practices from a continuing obligation to remedy them and imposes the total obligation upon an employer innocent of violation.

The decision below destroyed the right of Fabsteel employees to select their own bargaining representative. The remedy imposed altered the composition of the unit, albeit fictitiously, for the purpose of determining an objective basis for a good faith doubt of union majority. Assuming the twenty-one (21) strikers returning to work during the strike to be pro-union, there were no more than twenty-eight (28) of the fifty-six (56) who had ever been strikers. Twenty-eight (28) had never participated in the strike, and most had been hired across the picket line. Accordingly, a good faith basis existed for doubting the union's majority status, and Fabsteel properly declined to recognize the union.

The decision below, in enforcing the Board's order to bargain, observed that its enforcement of the Board's order requiring the "reinstatement" of the unfair labor practice strikers "makes it quite apparent that the majority of Fabsteel's employees after such reinstatement will be represented by the certified union." (Appendix 62a) Its mathematical computation was by alternative methods. Firstly, one should disregard twenty-two (22) strike replacements hired and treat the unit as composed of only thirty-four (34) employees, of whom twenty-eight (28) were union employees. Or, the Court authorized the addition of the twenty-two (22) employees whose "reinstatement"

was ordered to the unit of fifty-six (56); that is, a unit of seventy-eight (78), of whom only fifty-six (56) were actually employed. The alternative fictitious unit would contain fifty (50) union employees, a majority in a unit of seventy-eight (78). (Appendix 64a-65a)

Thus, the decision below ignores the rights of the employees actually hired by Fabsteel to participate in the designation of their own collective bargaining representative. Computation of majority status upon a fictitious unit artificially construed to contain either twenty-two (22) more or twenty-two (22) less employees than its actual composition distorts the *Burns* holding that a recently certified union in an unchanged unit is entitled to a presumption of continued majority status. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. at 278-279.

The need for protection to employees from a sudden transformation of their employer's business to a new legal entity cannot be gainsaid. Its extent varies with each case depending upon the circumstances and a proper balance of conflicting interests. The decision below demonstrates a fundamental failure by the Board to follow the teachings of this Court that due regard be given to rights traditionally enjoyed by an employer. Inherent in this decision to accord transcendence to employee claims against the predecessor employer are a variety of inchoate rights of such employees which become potential charges upon the employing enterprise. Such risks of exposure would make a prudent buyer avoid the purchase.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted this 16th day of May, 1979.

/s/ Walter W. Christy
WALTER W. CHRISTY

/s/ Andrew C. ParTEE, Jr.
ANDREW C. PARTEE, JR.

Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
Telephone: 504/524-4162

COUNSEL FOR THE
FABSTEEL COMPANY
OF LOUISIANA

CERTIFICATE

I hereby certify that I have caused a copy of the above and foregoing to be served this 16th day of May, 1979 by placing same in the United States Mail, postage prepaid, certified mail, return receipt requested upon:

Mr. Elliott Moore
Deputy Assoc. General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570

Mr. Wade H. McCree, Jr.
Solicitor General
U.S. Department of Justice
Tenth & Constitution Streets
Washington, D.C. 20530

/s/ Walter W. Christy
Of Counsel

APPENDIX

JD-236-77
Shreveport, LA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FABSTEEL COMPANY OF LOUISIANA

and Case 23-CA-6008
(Formerly 15-CA-6059)

UNITED STEELWORKERS OF AMERICA, AFL-CIO

DECISION

Statement of the Case

JERRY B. STONE, Administrative Law Judge: This proceeding, under Section 10(b) of the National Labor Relations Act, as amended, was tried pursuant to due notice on October 19 and 20, 1976, at Shreveport, Louisiana.

The charge was filed on April 1, 1976, in Region 15 of the NLRB (New Orleans, La.), and was docketed as Case 15-CA-6059. Thereafter, on April 13, 1976, said charge and case was transferred to Region 23 of the

NLRB (Houston, Texas) and renumbered and docketed as Case 23-CA-6008. The complaint in this matter was issued on August 18, 1976.

The issues presented by the pleadings and statements of counsel concern whether the Respondent (1) is a successor to Mosher Steel Company, (2) has, since on or about January 5, 1976, violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union with respect to an appropriate bargaining unit limited to certain described classifications of Respondent's employees, and (3) has violated Section 8(a)(3) and (1) of the Act by refusing, since on or about January 5, 1976, to "reinstate" certain named employees who had participated in an unfair labor practice strike against Mosher Steel Company.

All parties were afforded full opportunity to participate in the proceeding. Briefs have been filed by the General Counsel and the Respondent and have been considered.

Upon the entire record in the case and from my observation of witnesses, I hereby make the following:

Findings of Fact

I. The Business of the Employer

The facts herein are based upon the pleadings and admissions therein.

Fabsteel Company of Louisiana, the Respondent, is and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Louisiana, having its principal office and place of business in Shreveport, Louisiana, where it is engaged in the business of fabrication of structural steel products.

Mosher Steel Company is, and has been at all times material herein, a corporation duly organized under and existing by virtue of the laws of the State of Texas, having its principal office and place of business in Houston, Texas, where it is engaged in the business of fabricating structural steel products. Prior to January 1, 1976, Mosher Steel Company also owned and operated a facility in Shreveport, Louisiana, where steel products were manufactured.

During the calendar year of 1976, which period is representative of all times material herein, Respondent, in the performance of its business as described above, purchased goods and materials valued in excess of \$50,000, which goods and materials were shipped directly to Respondent's Shreveport, Louisiana, plant from points and places located outside the State of Louisiana. During the same period of time, Respondent sold materials valued in excess of \$50,000 to customers located at points and places outside the State of Louisiana, which materials were shipped directly from Respondent's Shreveport, Louisiana, plant to said customers.

During the past calendar year, which period is representative of all times material herein, Mosher Steel Company, in its performance of its business as described above, purchased goods and materials valued in excess of \$50,000 which were shipped directly to Respondent's Houston, Texas, facility from points and places located outside the State of Texas.

As conceded by the Respondent and based upon the foregoing, it is concluded and found that

(1) Fabsteel Company of Louisiana, the Respondent, is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(2) Mosher Steel Company is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved¹

United Steelworkers of America, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

¹ The facts are based upon the pleadings and admissions therein.

III. The Unfair Labor Practice Issue

A. Background and Setting²

Pursuant to a Stipulation for Certification Upon Consent Election, a secret ballot election was conducted on August 30, 1973, among the employees in the stipulated unit described below. The tally of ballots furnished the parties showed that of approximately 980 eligible voters, 912 cast valid ballots, of which 511 were for and 378 against the Petitioner.³ There were 23 challenged ballots, which were insufficient to affect the results of the election.

On January 18, 1974, the Board found the stipulated unit to be an appropriate bargaining unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The stipulated and found appropriate collective bargaining unit was as follows:

"Included: A companywide unit of the employees at all of the Employer's seven plants, at 3910 Washington and 6422 Esper-

² The facts are based upon the pleadings and admissions therein, upon stipulations, and upon official notice of the facts, concluding findings, and decision and order of the Board in *Mosher Steel Company*, 220 NLRB 336, and in the Board's Decision and Certification of Representatives in Case 23-RC-3989 in the *Mosher Steel Company* case reported at 208 NLRB 522.

³ The Employer was Mosher Steel Company. The Petitioner was the United Steelworkers of America, AFL-CIO.

son Street, Houston, Texas; San Antonio, Texas; Dallas, Texas; Lubbock, Texas; Tyler, Texas; and Shreveport, Louisiana; described as follows: All production and maintenance employees, including leadmen, truckdrivers, janitors, and all plant clericals. Excluded: All office clerical employees, draftsmen, inside and outside salesmen, watchmen, guards, professional employees, and supervisors as defined in the Act."

On January 18, 1974, the Board found, as indicated above, that the Petitioner had received a majority of the valid ballots cast in said election and that the Petitioner should be certified as the exclusive collective bargaining representative of the employees in the unit found appropriate.

On January 18, 1974, the Board certified the Petitioner, United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees of the Employer, Mosher Steel Company, in the appropriate bargaining unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, or other conditions of employment.

Thereafter, the Union, United Steelworkers of America, AFL-CIO, made a bargaining request on February 7, 1974. Following this, the Union and Mosher Steel Company had some bargaining sessions between March 6, 1974, and December 10, 1974.

A strike by a substantial number of employees at the seven plants involved in the appropriate unit commenced on July 22, 1974, and concluded, at least for the Mosher Steel Company Shreveport employees, on or about May 12, 1975. Said strike was an unfair labor practice strike, caused and prolonged by unfair labor practices committed by Mosher Steel Company.

Just prior to July 22, 1974, Mosher Steel Company had approximately 67 employees in bargaining unit positions at its Shreveport plant. On July 22, 1974, approximately 65 of the 67 Shreveport employees, part of the 7 plant bargaining unit, went out on strike. During the strike period (July 22, 1974 to May 12, 1975) Mosher Steel Company hired approximately 30 new employees. During the strike period, 21 or more employees who had gone out on strike from the Shreveport plant quit the strike and returned to work at the plant.

On April 23, 1975, Administrative Law Judge Samuel M. Singer issued his decision in *Mosher Steel Company and United Steelworkers of America, AFL-CIO* — Cases 23-CA-5165, 23-CA-5258 (formerly 16-CA-5699) and 23-CA-5282 (formerly 15-CA-5357). Judge Singer found that Mosher Steel Company had violated Section 8(a)(1) of the Act by certain conduct, had violated Section 8(a)(5) and (1) of the Act by refusing to bargain collectively, and that the strike by Mosher Steel Company employees commencing on July 22, 1974, was an unfair labor practice strike, caused and prolonged by Mosher

Steel Company's unfair labor practices. Judge Singer's recommended order included appropriate remedial action relating in part to requirement to bargain with the Union and to reinstatement of unfair labor practice strikers upon unconditional application for reinstatement.

As has been indicated, the unfair labor practice strike which commenced on July 22, 1974, concluded (at least for the Mosher Steel Company, Shreveport employees) on or about May 12, 1975. On or about May 12, 1975, unconditional offers were made to Mosher Steel Company for the Mosher Steel Company Shreveport unfair labor practice strikers to return to work. The record reveals that between May 12, 1975, and December 31, 1975, seven of Mosher Steel Company Shreveport unfair labor practice strikers were returned to work. Five of the Mosher Steel Company Shreveport unfair labor practice strikers were refused reinstatement on the alleged ground of misconduct.⁴

⁴ I officially note that the question of such misconduct's bearing on the five individual unfair labor practice strikers' right to reinstatement was litigated in a proceeding before Administrative Law Judge Jalette. The Board in *Mosher Steel Company*, 226 NLRB No. 180, found that Mosher Steel Shreveport unfair labor practice strikers Robert Wilkerson, Charles Stiles, and Benny Harris engaged in striker misconduct justifying a refusal to reinstate such employees. The conduct of Mosher Steel Company Shreveport unfair labor practice strikers Roosevelt Washington and Lee Taylor was found in effect to be of such a nature as not to impair their rights to reinstatement as unfair labor practice strikers, and it was found that the refusal to reinstate Washington and Taylor violated Section 8(a)(3) and (1) of the Act. Appropriate remedial order of reinstatement and backpay was issued in said decision on November 24, 1976.

The litigation of such issues in *Mosher Steel Company*, 226 NLRB No. 180, requires a finding that Roosevelt Washington and Lee Taylor, two of such five unfair labor practice strikers, were entitled to reinstatement after the offers to return to work on May 12, 1975.

On September 16, 1975, the Board issued its decision in *Mosher Steel Company*, 220 NLRB 336, adopting in major part Judge Singer's decision issued on April 23, 1975. The Board found that Mosher Steel Company had engaged in conduct violative of Section 8(a)(5) and (1) of the Act. The Board also found that the strike by Mosher Steel Company employees commencing on July 22, 1974, was an unfair labor practice strike, caused and prolonged by unfair labor practices of Mosher Steel Company. The Board issued appropriate remedial order requiring Mosher Steel Company to bargain with the Union and to reinstate the unfair labor practice strikers upon unconditional application for reinstatement. The Board's decision and order referred to above was enforced by Judgment of the Fifth Circuit — United States Court of Appeals on June 7, 1976.

*Agreement
Sale - Purchase
December 10, 1975*

B. On December 10, 1975, Mosher Steel Company of Louisiana, Inc. (a Louisiana corporation), Mosher Steel Company, Inc. (a Texas corporation), The Fabsteel Company of Louisiana (a Louisiana corporation),

and The Fabsteel Company (a Delaware corporation) entered into an agreement relating to the sale by Mosher Steel Company of Louisiana to The Fabsteel Company of Louisiana of certain assets, real estate, buildings, structures, machinery and equipment, tangible personal property, raw material and inventory, located in Shreveport, Louisiana.

Said agreement was written in terms of "certain assets," certain real property, excluded certain trailers, and indicated certain limitations on inventory or raw materials purchased. Said agreement contained clauses relating to purchaser's agreement to furnish labor to complete work in progress. Said agreement also provided for "closing" and transfer of documents and payments on December 31, 1976. Said agreement contained provisions relating to obligations as to pending labor related disputes and litigation. On the same day The Fabsteel Company of Louisiana and The Fabsteel Company, Inc. transmitted a letter to Mosher Steel Company and Mosher Steel Company of Louisiana, Inc. reflecting further understanding and agreement in respect to the possible reinstatement of certain former employees of Mosher Steel Company of Louisiana, Inc.

Events

December 16-31, 1975

C. On December 16, 1975, Chris Dixie, attorney for the Union, met with Larry M. Lesh, attorney for Mosher Steel Company. It is clear that Dixie and Lesh

discussed the pending sale of the Mosher Steel Company Shreveport plant and that Dixie requested information as to the agreement of sale.

On December 17, 1975, James P. Wolfe, a law partner of Dixie, transmitted a letter to President Fletcher Thorne-Thomsen of Fabsteel, Inc. Wolfe indicated that the United Steelworkers of America, AFL-CIO, had been advised that Fabsteel or a new corporation was in the process of purchasing Mosher Steel Company's Shreveport facility, that the expected termination of Mosher's operations was to be on December 31, 1975, and the anticipated commencement of operation by Fabsteel's affiliated company was to be on January 1, 1976. Wolfe's letter referred to understanding that Mosher Steel Company had advised the purchasers of the pending unfair labor practice proceedings and findings by the National Labor Relations Board. Wolfe's letter summarized the Board's findings relating to refusal to bargain, to an unfair labor strike, and to unfair labor practice strikers' rights to reinstatement. Wolfe requested that the purchaser recognize the Union for the production and maintenance employees at the Shreveport plant operation, and that the purchaser promptly reinstate all of the striking employees entitled to reinstatement under the current Board order whom Mosher had failed to reinstate as of the date of the letter. Wolfe's letter referred to an attachment setting forth the names of such employees. Wolfe's letter also set forth a description of the appropriate bargaining unit for which recognition as

bargaining agent was being made. Wolfe's letter indicated that the strikers would make application in the manner requested.

On December 23, 1975, Larry Lesh, attorney for Mosher Steel Company, by letter, advised Chris Dixie, attorney for the Union, of certain provisions in the December 10, 1975, agreement of sale-purchase between Mosher Steel Company and The Fabsteel Company previously referred to. Enclosed with Lesh's letter was an Exhibit P containing description of pending labor related disputes and litigation. Said exhibit referred to Case 23-CA-5360. Said case is the one disposed in the National Labor Relations Board decision reported at 226 NLRB No. 180. Said exhibit also referred to Cases 23-CA-5165, 23-CA-5258, and 23-CA-5282 as being on appeal to the United States Fifth Circuit Court of Appeals. Said Board decision is reported at 220 NLRB 336 and was enforced by Judgment of the United States Fifth Circuit Court of Appeals on June 7, 1976.

The Successorship

D. The facts are clear that the Fabsteel Company of Louisiana, on December 31, 1975, purchased, pursuant to prior agreement of December 10, 1975, in substantial effect the real property, physical assets, machinery, equipment, and inventory of Mosher Steel's Shreveport plant. The wording of the agreement to purchase refers in parts to certain real property and certain assets. The facts relating to the agreement and

to the commencement of work with the same work force persuade that in substantial effect Mosher Steel's Shreveport plant was sold to and acquired by the Fabsteel Company of Louisiana on December 31, 1975.

The General Counsel alleges and contends and the Respondent denies that accounts receivable, trade assets, and goodwill of Mosher Steel Company were purchased by the Fabsteel Company of Louisiana. In my opinion, the evidence does not support the General Counsel's contentions. First, as to accounts receivable, there is no evidence that the Fabsteel Company of Louisiana purchased accounts receivable from Mosher Steel Company. Rather, the parties entered into a business agreement wherein the Fabsteel Company was to furnish labor to finish work in progress for Mosher Steel Company. Perhaps the details as to compensation might reveal an arrangement warranting a conclusion that such arrangement in effect was a sale and purchase of accounts receivable disguised as another relationship. Such details have not been presented. Thus, the evidence is insufficient to reveal that accounts receivable were sold and purchased. Regardless of whether accounts receivable were sold and purchased, continued work by employees on work in progress tends to support a finding of successorship status.

There is no evidence to reveal that the Fabsteel Company of Louisiana purchased "trade assets" and "goodwill" from Mosher Steel Company. Statements

by the General Counsel at trial revealed that in effect his contentions are that "trade assets" and "goodwill" are the same. The agreement to purchase did not refer to "goodwill" or "trade assets," does not refer to agreement by Mosher Steel not to compete, and the name of the Fabsteel Company of Louisiana does not indicate a reliance or free ride upon the reputation of Mosher Steel Company.

On December 31, 1975, Mosher Steel's Shreveport plant employee complement consisted of 56 non-supervisory employees.⁵ On December 31, 1975, Mosher Steel Company ceased operation of the Shreveport plant and terminated all employees and supervisors. The Fabsteel Company of Louisiana took applications from all the employees and supervisors working for Mosher Steel Company at Shreveport, Louisiana, on December 31, 1975, hired all such employees and supervisors, paid such employees for 2 days of holidays (apparently January 1 and 2, 1976) and commenced operation with the same employee complement on January 5, 1976. All such employees, including management, were given credit for prior service with Mosher Steel Company, and the employees were assigned the same employee employment number as used at Mosher Steel Company in Shreveport, Louisiana. Employees hired by Mosher Steel Company after

⁵ The exhibit setting forth the names of such employees listed 60 employees. Testimonial evidence revealed, however, that such list included four persons who appear to be supervisors. (B. Johnston, L. Johnson, Pugh, and Settle). Whether several of these were leadmen and perhaps non-supervisory is not clear.

January 5, 1976, whether previously employed by Mosher Steel Company or not, were treated as new hires and given new assigned numbers.⁶

The facts relating to the operations of Mosher Steel Company at Shreveport prior to December 31, 1975, and to the operations of the Fabsteel Company of Louisiana at Shreveport on January 5, 1976, and thereafter reveal that the employee complement continued substantially doing the same work with the same equipment. Some testimony was presented that some newer equipment was purchased, installed, and used after January 5, 1976, and that such equipment was more efficient. Such type of change, however, is not of a substantial nature as regards the question of successorship.

In December, 1975, Mosher Steel Company had a bargaining obligation as regards its production and maintenance employees because of the certification of the 7 plant Mosher Steel unit in 1974 and because of the Board's order in the case reported at 220 NLRB 336. As noted before, Mosher Steel Company of Louisiana and the Fabsteel Company of Louisiana entered into an agreement of purchase-sale of the Shreveport plant. Such agreement also contained clauses relating to con-

⁶ I note however that clock no. 8993 was assigned to James M. Jordan as of 12/31/75, that an employee named R.S. Varnell first appears on the records in this case in records for August, 1976, with a clock no. 8991. Perhaps Varnell was not in the bargaining unit and therefore not included in the earlier records.

tinuation of the current pay scales for management and employees.

The Fabsteel Company of Louisiana Shreveport plant employees after January 5, 1976, were continued to be paid the wage scales utilized at the Mosher Steel Company of Louisiana prior to December 31, 1975.

A comparison of other fringe benefits enjoyed by Mosher Steel's Shreveport employees as compared to the Fabsteel Shreveport employees reveals the following. The Fabsteel Company instituted a health insurance program with greater benefits than the program used by Mosher. Mosher paid the employees' share of such insurance but the employees paid for coverage for dependents. *Both the Fabsteel Company and the employees paid a percentage of both employee and family coverage after January 1, 1976.* Thus, The Fabsteel employees had to pay a percentage of their own insurance coverage wherein before (at Mosher) they had paid nothing for such coverage at Mosher. Further, the Fabsteel employees paid a percentage of the family coverage wherein before (at Mosher) they had had to pay the total costs for such coverage.

Mosher Steel's employees had been covered by a retirement plan. When The Fabsteel Company acquired the Shreveport plant, such plan was terminated and a new different plan in effect at another Fabsteel plant was implemented.

Mosher Steel's employees had received 7 paid holidays per year whereas The Fabsteel Company Shreveport employees were employed on the basis of 10 paid holidays per year. Mosher employees' vacation plan involved 1 week vacation after 1 year, 2 weeks after 5 years, and 3 weeks after 15 years. The Fabsteel Company Shreveport vacation policy instituted involved 1 week vacation after 1 year, 2 weeks after 2 years, 3 weeks after 8 years, and 4 weeks after 18 years.

After the sale of the Shreveport plant, Mosher ceased participating in the market in the area. Some of Mosher's customers became customers of the Fabsteel Company after January 1, 1976. The Fabsteel Company has participated in a wider marketing area for the Shreveport plant than had been used by Mosher before the December 31, 1975, sale of the Shreveport plant.

There are also some differences in the handling of invoicing and related matters between the Mosher Steel Shreveport operation and The Fabsteel Shreveport operation. Thus, Mosher handled invoicing and collection and personnel records from its office in Houston, Texas. Fabsteel handles invoicing and collections, and personnel records on a local basis at the Shreveport office. Mosher had an organizational set up of separate departments at the Shreveport operation. Fabsteel, since the acquisition of the Shreveport plant from Mosher, has combined all departments into one department.

Fabsteel Company utilizes a broader based method of estimating, casting, and pricing products as compared to a more broken down method utilized by Mosher in its operations.

Mosher Steel Company's Shreveport plant was one of a number of plants operated by Mosher. Mosher's smaller plants, such as its Shreveport plant, were involved in production for commercial work. After the sale of Mosher's Shreveport plant, Mosher continued work in other plants mainly of an industrial work nature. The Fabsteel Company of Louisiana is similarly one of several plants of The Fabsteel Company set up as different corporations apparently. The Fabsteel Company of Louisiana has continued doing the commercial work as did Mosher. The Fabsteel Company also commenced doing industrial work (Petro chemical and chemical customers) mainly for The Fabsteel Company at Waskom. The volume of such work was at first 90% of such work for the Waskom plant, and later such percentage decreased to 50% for Waskom, apparently as local customers were picked up.

Both Mosher's Shreveport plant and The Fabsteel's Shreveport plant have had temporary exchanges of employees with other plants in related or affiliated corporations of their parent corporations. Some work produced at the Fabsteel Company of Louisiana is processed at Shreveport and at the Fabsteel's Waskom plant.

The Fabsteel Company of Louisiana has operated with basically the same employee complement and the same supervision after January 1, 1976, as had Mosher before December 31, 1975. Thurman occupied the same position as General Manager at the plant for both corporations. Thurman credibly testified to the effect that he had not engaged in labor negotiations for Mosher with the Union and that at Fabsteel he had not been given labor relations responsibilities. Thurman also credibly testified to the effect that the line of authority from him to top management for Fabsteel was from him to President Thorne-Thomsen, that Thorne-Thomsen came over to Shreveport frequently from Waskom, and that Vice-President Burnley (engineering) was over daily from Waskom to render staff assistance. Whether this is different or not in effect from the line of command or assistance rendered when he was Mosher's General Manager is not revealed.

Thurman's testimony as to job openings reveals in effect that the same job classifications, duties of employees, and work in Fabsteel's operation essentially continued as had been in Mosher's operation.

As has been previously noted, the production and maintenance employees at Mosher's Steel Shreveport plant were part of an overall 7 plant Mosher Steel bargaining unit. Such bargaining unit as described in specifics for the 7 plant unit has been found to be an appropriate bargaining unit. The number of employees at

the Shreveport location on December 31, 1975, and on January 1 and 5, 1976, numbered 56 or 58.⁷ A unit of employees of 56 or 58 in number paralleling the description of the larger 7 plant unit is also an appropriate bargaining unit. The same reasoning relating to community of interest would apply, and the evidence of the appropriateness of the larger unit would constitute a preponderance of evidence requiring a finding that the smaller unit with similar classification description be appropriate for bargaining.

In the background of significant geographical dispersion of the 7 plant Mosher unit, the facts reveal a sufficient identity of the Shreveport employees as a separate group to warrant from a structure viewpoint a separate employee complement.

Considering all of the foregoing, I am persuaded and conclude that The Fabsteel Company of Louisiana on January 1, 1976, constituted a successor to the Mosher Steel Company of Louisiana as the enterprise operating the Shreveport plant involved herein. Thus, the facts reveal that substantially the same employees and supervisors continued after the change in ownership on December 31, 1975. Such employees have continued doing substantially the same work on the same equipment at the same location. Essentially, what has

⁷ The facts indicate that B. Johnson, and George Pugh, Jr. were supervisors at the time of the sale of the plant on December 31, 1975, and when Fabsteel commenced operation. This being so, the number of employees in the complement was 56. If, however, Johnson and Pugh were merely leadmen and nonsupervisory, the number of employees would be 58.

happened is that The Fabsteel Company has continued the same work of a commercial nature but added work of an industrial nature. Although the products for the industrial nature work involves some differences, such work is basically the same. I do not find that the changes in fringe benefits basically affects the question of the continuation of the employing enterprise. Such benefits do not appear to have been substantially changed. Further, bookkeeping and other changes have little bearing on a realistic evaluation of continuation or lack of continuation of an enterprise. The overall structures of Mosher and of Fabsteel appear substantially similar.

The employee unit complement continued the same at Fabsteel as at Mosher. The fact that the certified bargaining unit at Mosher involved a 7 plant unit is not significant in evaluating structural change or lack thereof when it is clear that a single plant unit is also appropriate. Rather the 7 plant unit is essentially similar in nature to a situation of multi-plant or multi-employer bargaining in an agreed merger of single units into one bargaining unit or as part of multi-unit bargaining.

In sum, the facts reveal that The Fabsteel Company of Louisiana is a successor employer to the Mosher Steel Company as employer of the Shreveport plant involved herein.

E. *The Refusal to Bargain*

1. The General Counsel alleges that all production and maintenance employees, including leadmen, truck-drivers, janitors and plant clericals employed at Respondent's Shreveport, Louisiana plant, excluding guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act. The Respondent admits in effect that a unit of all production and maintenance employees at the Shreveport plant is appropriate but denied, because there might be issues relating to specific inclusion of various classifications, the remainder of the allegations.

The matter of appropriateness of the alleged appropriate bargaining unit has been discussed in the "successorship" section herein. No specific evidence as to specific inclusion or exclusion of classifications has been presented. In effect, the facts reveal that a described appropriate bargaining unit, of the described classifications included in this alleged appropriate bargaining unit but relating to a 7 plant Mosher Steel unit, was stipulated to be appropriate and was so found by the Board on January 18, 1974. Further, such unit was certified as the appropriate unit on January 18, 1974. As indicated beforehand, the community of interest of the employees as to inclusions and exclusions from such 7 plant unit similarly persuade that the same inclusions and exclusions would prevail for a single plant

unit. Accordingly, I conclude and find that the alleged appropriate bargaining unit constitutes a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.⁸

2. The pleadings establish and I so find that the Union (United Steelworkers of America, AFL-CIO) on or about December 17, 1975, requested and continued to request Respondent to bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of all the employees of Respondent in the single plant unit described above.

The pleadings also establish and I so find that — commencing on or about January 5, 1976, and at all times thereafter, Respondent did refuse, and continues to refuse to recognize the Union and to bargain collectively with the Union as the exclusive collective bargaining representative of all the employees in the single plant unit described above with respect to wages, hours, and working conditions and other terms and conditions of employment for the employees in said unit.

3. As indicated above, it is clear that the Respondent has refused to bargain with the Union as to wages,

⁸ I note that office clericals were specifically excluded from the stipulated 7 plant unit, that "office clericals" are not included in the alleged single plant unit as being included and that "office clericals" are not specifically excluded from such single plant unit.

terms, and conditions of employment covering the employees in the appropriate bargaining unit. I note that Attorney Ramsey, for the Respondent, replied to Wolfe's December 17, 1975, request for recognition and bargaining on January 5, 1976. Ramsey's letter indicated an awareness of the unfair labor practice claims, set forth Respondent's contention that it was not a "successor", set forth Respondent's contention that it did not believe the Union to represent a majority in any unit appropriate for bargaining, and suggested that the Union file a representation petition.

On March 22, 1976, Attorney Dixie, for the Union, spoke to Attorney Ramsey, for the Respondent, and offered to prove the Union's majority statutes [sic] by a card check. Dixie offered such proof related to a majority of the employees working, as well as related to a count of those working and of unreinstated strikers. Ramsey stated that he would check with his client, the Respondent, and call back if the Respondent were willing to agree to a card check for majority status determination. Dixie received no further communication on this point.

4. The facts reveal the following with respect to the employees in the appropriate bargaining unit as of January 5, 1976. There were 56 non-supervisory employees in the Mosher Steel Company unit at the Shreveport plant on December 31, 1975. Respondent's unit on January 1 and 5, 1976, had 56 non-supervisory employees, the same employees who had been working for Mosher Steel at Shreveport on December 31, 1975.

Of these 56 employees, the following may be noted. Twenty-one of Respondent's non-supervisory employees were employees who had been striking employees at Mosher Steel Company's Shreveport plant and had returned to work before the cessation of the strike on May 12, 1975. Seven (7) of Respondent's non-supervisory employees were employees who have been striking employers at Mosher Steel's Shreveport plant and who were reinstated to their jobs between May 12, 1975, and December 31, 1975. Twenty-eight (28) of Respondent's employees on January 1 and 5, 1976, were employees who were either hired after the strike commenced on July 22, 1974, or had not gone out on strike. The record indicates that the number of employees who had not gone out on strike was around 2. As of December 31, 1975, there were 22 unfair labor practice strikers entitled to reinstatement by Mosher Steel Company at the Shreveport plant. As of January 1, and 5, 1976, there were 22 unfair labor practice strikers entitled to reinstatement by the Respondent.⁹

⁹ The records relating to employees, their clock numbers, and status on Mosher Steel's payrolls, and the facts in *Mosher Steel Company*, 220 NLRB 336, in composite effect form the basis for the above numerical findings as to employees working on December 31, 1975, and on January 1 and 5, 1976. The facts, findings, and order in *Mosher Steel Company*, 220 NLRB 336, the evidence in this case as to certain terminations and quits, and the findings, facts, and order in *Mosher Steel Company*, 226 NLRB no. 180, in composite effect with the records in this case, form the basis for the findings as to the 22 unreinstated strikers.

Contentions

Conclusions

The General Counsel contends that the Respondent was obligated to bargain with the Union because (1) under the theory of *Golden State Bottling*¹⁰ the Respondent was obligated as a successor to remedy Mosher's unfair labor practices relating to refusal to bargain and to the reinstatement of unfair labor practice strikers and (2) under the *Burns* doctrine¹¹ the Respondent was obligated to bargain as a successor because such obligation had devolved upon the "successor."

The Respondent contends in effect that it is not a successor, that for there to be a successor, there has to be a termination of the predecessor, that the 1 plant unit was not the certified unit, that there is a question of majority status, that an employer is free as a successor to hire employees it wishes to hire, that Respondent had an objective basis for doubt of the Union's majority status, and that Respondent and Mosher could decide upon Mosher's remedying the unfair labor practices.

Considering all of the evidence and the contentions of the parties, I am persuaded, conclude, and find that the Respondent was a successor having the obligation to remedy Mosher Steel's bargaining obligation and

10 *Golden State Bottling Company v. N.L.R.B.*, 414 U.S. 168 (1913)

11 *Burns International Security Service*, 406 U.S. 272 (1972)

other unfair labor practices as they affected the Shreveport plant unit, and under the circumstances, as a successor, to bargain with the Union as to the Shreveport plant complement.

Under the *Burns* doctrine, one of the factors for consideration as to a Respondent's obligation to bargain as a "successor" is whether there is a question as to majority status regard the Union. In this case, the certified bargaining unit covered 7 plants geographically separated. Normally slight increases or decreases of employees in a bargaining unit are presumed [sic] not to affect the majority status of the representative. It would appear that the presumption of majority accorded a representative as to an overall unit of plants would be a presumption of equal distribution throughout the whole unit and that the presumption would apply equally as to the individual plants involved. Absent some evidence of employee dissatisfaction or change, such presumption would continue to constitute evidence of a majority status throughout the unit was [sic] well as in the separate parts of the overall unit.

In the instant case, the facts reveal that 65 of 67 employees in the Shreveport plant part of the overall 7 plant unit went out on strike on July 22, 1974. Twenty-one (21) of such employees returned to work for Mosher prior to May 12, 1975, and 7 other of such employees returned to work before December 31, 1975. Twenty-two (22) of such employees who were unreinstated unfair labor practice strikers and entitled

to reinstatement had not been reinstated as of the time Respondent commenced operations on January 1 and 5, 1976. As to the unfair labor practices and obligations regarding refusal to bargain and to reinstatement of unfair labor practice strikers, the Respondent was clearly on notice. In addition to the above, the Respondent had employed some 28 employees who had not been strikers or who had been hired during the strike against Mosher Steel.

Thus, the bargaining unit of employees consisted of 78 employees. Fifty-six of such employees were actually employed, and 22 of such employees had a status of entitlement to reinstatement as unfair labor practice strikers. It is clear, considering the question of presumption flowing from the January 18, 1974, certification, and from the evidence of employee support for the union by virtue of 65 out of 67 employees going on strike on July 22, 1974, the evidence that 28 of such employees were actually employed on January 1 and 5, 1976, and that 22 of such employees were unreinstated unfair labor practice strikers entitled to reinstatement, that the Union enjoyed majority status on December 17, and 31, 1975, and on January 1, 1976, and thereafter.

The Respondent contends that there can not be a successor unless the predecessor has been terminated. I reject such contention. The question as to successorship relates to a continuation of the employing enterprise and whether there are or are not sub-

stantial changes affecting the employee relationship.¹² The Respondent contends that as a successor it is free to hire the employees it wishes. In a sense this is true. However, a Respondent obligated to remedy unfair labor practices of a predecessor in the process of litigation, including the reinstatement of unfair labor practice strikers, acts at its peril if it does not reinstate such unfair labor practice strikers.¹³ Conceivably, the Respondent might have hired a complement of employees including former Mosher Steel Company employees at Shreveport and including new employees, and the composition of such employees might not have comported to the requirements of *Burns* as to the tests requiring successorship findings. I do not find it necessary in this case to determine the question of the effect of the unreinstated unfair labor practice strikers upon the *Burns* test as to comparison of employees in the predecessor and the successor excepting as to the question as to majority representation status. The Respondent in this case hired all of the working employees at the predecessor. Having done so, the only question remaining is the question of the

12 The essence of Respondent's argument as to termination of the predecessor is contrary to the Board's and Court's Decision in *Parkwood IGA*, 201 NLRB 905, and *Zinn's Foodliner, Inc.*, 85 LRRM 3019, enforcement of the Board's *Parkwood IGA* Decision.

13 It is noted that the Board's decision in *Mosher Steel Company*, 220 NLRB 336, issued on September 16, 1975, prior to Respondent's taking over and operating the Shreveport plant.

effect of changes upon "majority" status as to representation.¹⁴

As indicated above, it is clear that the Union enjoyed majority status as the collective bargaining representative of the employees in the appropriate bargaining unit.¹⁵

The Respondent contends in effect that it had an objective basis for doubting the Union's majority status in the appropriate bargaining unit. Essentially, it appears that the Respondent contends that the fragmentation of the 7 plant Mosher Steel unit and its purchase and operation of only 1 of such 7 plants plus the unit's composition of 28 of the employees who were employed as of the beginning of the strike and of 28 new or non-striking employees afforded it an objective good faith doubt as to the majority status of the Union.

Considering the fact that the Shreveport plant complement for the Respondent was determined as of

¹⁴ Reinstatement of unfair labor practice strikers involves reinstatement of such unfair labor practice strikers, discharging if necessary such replacements as have been hired. Thus, Respondent could have retained the replacement employees and reinstated the unfair labor practice strikers for a total work complement of 78, or the Respondent could have terminated such replacements as hired in order to reinstate the unfair labor practice strikers in accordance with economic needs.

¹⁵ The Union would have enjoyed majority status even if some of the replacement employees had been discharged to make room for the reinstatement of unfair labor practice strikers.

January 1, and 5, 1976, when attorney Ramsey rejected the Union's request for bargaining, I am persuaded that the Respondent did not have a good faith doubt as to the Union's majority status. Thus, it is clear that Respondent was aware of its obligation to reinstate unfair labor practice strikers, that 28 of the 56 non-supervisory employees working had been strikers and that it was obligated to reinstate 22 unfair labor practice strikers. Considering this along with the clear knowledge that there had been determination of unfair labor practices by its predecessor, I find that the evidence preponderates for a finding that the Respondent did not have an objective good faith doubt as to the Union's majority status.¹⁶

Considering all of the above, I conclude and find that under the *Burns* doctrine, the Respondent had an obligation on January 1 and 5, 1976, to bargain with the Union regarding wages, terms, and conditions of employment of employees in the appropriate bargaining unit. I conclude and find, therefore, that Respondent's refusal to bargain with the Union as to wages, terms, and conditions of employment of employees in such appropriate collective bargaining unit constituted a refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act.¹⁷

¹⁶ The Respondent's failure to respond to the Union's offer for a card-check re majority status is supportive of such finding under the circumstances of this case.

¹⁷ *CF Parkwood IGA*, 201 NLRB 905, enforced *Zinn's Foodlines, Inc.*, 85 LRRM 3019.

Considering all of the foregoing, I am also persuaded that the Respondent's obligation to remedy the refusal to bargain obligations of the predecessor as such affected the Shreveport plant employees warrants a finding of refusal to bargain as regards such employees. I am persuaded that essentially the same consideration of the refusal to bargain under the *Burns* doctrine would apply under the *Golden State* theory. Thus, in considering the problem of remedial obligation, the question is one of practicability in measuring the interests of the employees and of the employer and determining an appropriate remedy. Thus, the Respondent was faced with an obligation to remedy a refusal to bargain by a predecessor as to a 7 plant unit when Respondent's had only acquired a 1 plant unit. Such employees in Respondent's 1 plant unit were entitled to remedy of the effects of the predecessor's refusal to bargain. It is clear that the Respondent was obligated to tailor its remedy of such action as regards the 1 plant unit. The facts are clear that the changes involved in acquisition of the 1 plant unit did not destroy the Union's majority status. Considering Respondent's remedial obligations as to the unfair labor practices and in connection therewith the lack of a good faith doubt as to majority status, it is clear that the Respondent was obligated to bargain with the Union on January 1 and 5, 1976, because its obligation to bargain was fixed by its obligation to remedy unfair labor practices. In essence, the same considerations for a bargaining obligation under the *Burns* theory and under the *Golden State* theory are required in the factual context of this case. In sum, I

conclude and find that the Respondent violated Section 8(a)(5) and (1) of the Act because of its admitted refusal to bargain with the Union as to the appropriate bargaining unit because of its obligation to remedy a refusal to bargain by the predecessor.

F. *The Refusal To Reinstate Unfair
Labor Practice Strikers*

The General Counsel alleges and contends and the Respondent denies that the Respondent discriminatorily refused to reinstate 30 unreinstated unfair labor practice strikers after it commenced operations on or about January 5, 1976.

The General Counsel has several theories of violative conduct. One contention is that the Respondent had an obligation to reinstate unfair labor practice strikers and did not do so. Another is that the Respondent engaged in actual discriminatory consideration of employees for hire and did not hire such alleged 30 employees because they had engaged in an unfair labor practice strike. Another contention is that the Respondent adversely considered such employees for hire on an individual basis and on a discriminatory basis because of their striking activity.

As to the 30 alleged employees contended to have been discriminated against, the facts reveal that there were only 22 unreinstated unfair labor practice strikers entitled to reinstatement by the Respondent when

Respondent commenced operations on January 1 and 5, 1976. Such 22 unfair labor practice strikers entitled to reinstatement by the Respondent pursuant to its obligation to remedy the predecessor's unfair labor practices and to reinstate unfair labor practice strikers were as follows; George W. Brown, James Cheatham, L. D. Coleman, Herman Gilliam, Mertin Horton, Jr., Claudia V. Johnson, Larry D. McDonald, Edward C. McLean, Latham Montgomery, Herman L. Patterson, John M. Patterson, Clyde Pennywell, Joe N. Peyton, John A. Pouncy, Jr., Cleo Pratt, Robert C. Procell, Lee G. Taylor, Rickey C. Taylor, Charles H. Thomas, Rufus Walls, Roosevelt Washington, and Donald G. Woodward.

The General Counsel had alleged that the Respondent had discriminatorily refused to hire eight other employees who had been unfair labor practice strikers. The facts reveal that these eight employees had (with respect to the predecessor) quit, been reinstated, refused reinstatement, or were disqualified for reinstatement by conduct on the picket line during the unfair labor practice strike against the predecessor — Mosher Steel Company. Thus in 1974 or 1975, David O. Anderson, Jerry L. Stallings, and Joseph Tuminello had all quit employment at Mosher Steel Company. Johnny L. Roberson had refused reinstatement in 1975. Employees Benny L. Harris, Charles E. Stiles and Robert Wilkerson had engaged in misconduct during the unfair labor practice strike against Mosher Steel Company and were not entitled to reinstatement as

unfair labor practice strikers.¹⁸ Employee Robert W. Jones had been reinstated and was working on January 1 and 5, 1976.

Two (2) of the 22 unfair labor practice strikers entitled to reinstatement by the predecessor before December 31, 1975, and by the Respondent pursuant to its remedial obligations were Lee G. Taylor and Roosevelt Washington. The Respondent's contended reason for refusal to reinstate or hire these two, Taylor and Washington, was alleged misconduct on the picket line during the unfair labor practice strike against the predecessor. In *Mosher Steel Company*, 226 NLRB No. 180, it was found that such employees had not engaged in disqualifying misconduct and were entitled to reinstatement and back pay. The Respondent was on notice of such unfair labor practice proceedings at the time of purchase of the Shreveport plant. The Respondent's failure of reinstatement of such employees was one of acting at its peril, and the determination has been contrary to its contentions.

The facts are clear that unconditional offers to return to work were made to Mosher Steel Company on May 12, 1975, by the unfair labor practice strikers. The facts are also clear that the Board's decision in *Mosher Steel Company*, 220 NLRB 336, included (a) findings that the strike from July 22, 1974, to May 12, 1975, was an unfair labor practice strike, and (b) an order relating to reinstatement and backpay for unfair labor

¹⁸ *Mosher Steel Company*, 226 NLRB No. 180

practice strikers, including the 22 unreinstated unfair labor practice strikers referred to herein. Said Board decision issued on September 16, 1975. The facts are clear that the Respondent was aware of the pending unfair labor practice cases.

The Respondent contends in effect that agreements were made by it with Mosher Steel Company whereby question of remedy concerning reinstatement of unfair labor practice strikers would be taken care of by actions by Mosher Steel. Further evidence was offered and received to the effect that, in 1976, Mosher Steel offered certain of the unreinstated unfair labor practice strikers jobs at other Mosher Steel plants, with moving expenses. Certain of such employees accepted such reinstatement but advised Respondent, Fabsteel, that they desired reinstatement at the Shreveport plant. First, parties cannot by private agreements undermine the responsibilities to comply with the National Labor Relations Act or remedial orders of the Board. Secondly, offer of jobs away from the employing enterprise which is continuing does not constitute an offer of reinstatement which effectuates the purposes of the Act.¹⁹

The facts are clear that attorney Wolf, for the Union, on December 17, 1975, reiterated a request to the

¹⁹ See, *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605, and cases cited therein.

Respondent for reinstatement of such unreinstated unfair labor practice strikers.²⁰

The right of reinstatement pursuant to an adjudicatory order is a continuing one. It is clear that Respondent was on notice of such obligation of reinstatement. As soon as the Respondent became a successor, which it did on January 1, 1976, such knowledge and obligation blended, and the failure to reinstate such unreinstated unfair labor practice strikers constituted conduct violative of Section 8(a)(3) and (1) of the Act.

The General Counsel, as indicated, argued a number of theories in support of his contention of violative conduct in refusal to reinstate the unreinstated unfair labor practice strikers. One theory is that the Respondent actually considered on a discriminatory basis the selection of the employees for hire. Thus, the General Counsel contends that the Respondent discriminatorily considered and refused to reinstate the unfair labor practice strikers because of their striking activity. I am not persuaded that the facts support this contention excepting with respect to employees Taylor and Washington. The violative conduct found herein is based simply upon the inherent effect of discrimination flowing from the refusal to reinstate unfair labor prac-

²⁰ Evidence of conversation between Wimberly and Thurman was introduced relating to offer to return to work in late December, 1975, and early January, 1976. I found Thurman to appear the more credible witness and credit his version of facts over Wimberly's.

tice strikers who are entitled to reinstatement and who have made offers to return to work.

As to Taylor and Washington, the facts reveal that the Respondent refused to consider them for some job openings because of alleged misconduct as strikers. In *Mosher Steel Company*, 226 NLRB No. 180, it was found that Taylor and Washington had not engaged in disqualifying misconduct during the strike. Under such circumstances, Respondent's conduct in refusing to consider Taylor and Washington for employment constituted conduct violative of Section 8(a)(3)(1) of the Act.²¹

The General Counsel also contended that Respondent discriminatorily considered the unreinstated strikers for job openings after it commenced operation on January 1 and 5, 1976. Excepting for the fact that the unreinstated unfair labor practice strikers were entitled to reinstatement, I do not find that the evidence presented reveals discrimination as to the selection of employees for job openings. The reasons given for the individual selection of new employees appeared plausible.

In sum, I conclude and find that the Respondent's failure and refusal to reinstate on January 1, 1976, the 22 unreinstated unfair labor practice strikers constituted conduct violative of Section 8(a)(3) and (1) of the Act.

²¹ *Mosher Steel Company*, 226 NLRB 180; *Burnup and Sims*, 379 US 21.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in Section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that the Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action to effectuate the policies of the Act.

Respondent's refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act shall be remedied by an order requiring it to bargain, upon request, with the Union, as regards wages, hours, terms, and working conditions of employment of the employees in the appropriate single plant unit found herein, and to embody any understanding reached into a signed agreement.

Respondent's failure and refusal to reinstate certain 22 unreinstated unfair labor practice strikers in violation of Section 8(a)(3) and (1) of the Act, shall be reme-

died by an order requiring reinstatement and backpay to the 22 referred to unreinstated unfair labor practice strikers, excepting for Patterson and Walls who have now been reinstated, and as to Patterson and Walls, requiring that they receive backpay from January 1, 1976, to date of reinstatement.²²

Backpay due to the discriminatees in this proceeding shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289, with 6 per cent interest thereon in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that the Respondent cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. The Fabsteel Company of Louisiana, the Respondent, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act,

²² The question of Respondent's backpay liability for the time prior to January 1, 1976, is not presented and apparently left for resolution in the compliance stage of *Mosher Steel Company*, 220 NLRB 336.

and is a successor employer to the Mosher Steel Company as regards the Shreveport plant employees who formerly worked for Mosher Steel Company at Shreveport, Louisiana.

2. United Steelworkers of America, AFL-CIO, is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees, including leadmen, truckdrivers, janitors, and all plant clericals employed at Respondent's Shreveport, Louisiana plant, excluding guards, watchmen and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times since January 1, 1976, and continuing to date, the Union has been the representative for the purposes of collective bargaining of the employees of the unit described above, and, by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees in said unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

5. The Respondent, since on or about January 1, 1976, and at all times thereafter, has refused and continues to refuse to recognize and bargain with the Un-

ion as the exclusive collective bargaining representative of all the employees in the Unit described above with respect to wages, hours, and working conditions and other terms and conditions of employment for the employees in said unit in violation of Section 8(a)(5) and (1) of the Act.

6. The Respondent, on or about January 1, 1976, discriminated against unreinstated unfair labor practice strikers by refusing to reinstate such unfair labor practice strikers in violation of Section 8(a)(3) and (1) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²³

Respondent, The Fabsteel Company of Louisiana, its officers, agents, successors, and assigns, shall:

²³ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Refusing to reinstate or otherwise discriminating against employees in regard to hire or tenure of employment, or any term or condition of employment because of their union or protected concerted activities, including their engaging in an unfair labor practice strike, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

(b) Refusing to recognize or bargain with the Union as exclusive collective bargaining representative of all the employees in the appropriate collective bargaining unit set out below as to wages, hours, terms, and conditions of employment of such employees.

(c) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent permitted by the proviso to Section 8(a)(3) of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act.

(a) Offer to the employees named below, excepting for Walls and John M. Patterson, immediate and full reinstatement to the former position held by each or, if such position is no longer existing, to a substantially equivalent position, without prejudice to each's seniority, or other rights previously enjoyed, and make

whole each of the employees named below, including Walls and John M. Patterson, for any loss of pay or other benefits suffered as a result of the failure to reinstate such unfair labor practice strikers on January 1, 1976, in the manner described above in the section entitled "The Remedy."

George W. Brown
James Cheatham
L. D. Coleman
Herman Gilliam
Mertin Horton, Jr.
Claudia V. Johnson
Larry D. McDonald
Edward C. McLean
Latham Montgomery
Herman L. Patterson
John M. Patterson

Clyde Pennywell
Joe N. Peyton
John A. Pouncy, Jr.
Cleo Pratt
Robert C. Procell
Lee G. Taylor
Rickey C. Taylor
Charles H. Thomas
Rufus Walls
Roosevelt Washington
Donald G. Woodward

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms and this recommended Order.

(c) Upon request, bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate collective bargaining unit and, if an understanding is reached, embody such understanding in a signed agreement.

The appropriate collective bargaining unit is: All production and maintenance employees, including leadmen, truckdrivers, janitors and plant clericals employed at Respondent's Shreveport, Louisiana plant, excluding guards, watchmen and supervisors as defined in the Act.

(d) Post at Respondent's plant at Shreveport, Louisiana copies of the attached notice marked "Appendix."²⁴ Copies of said notice, on forms provided by the Regional Director for Region 23, after being duly signed by Respondent's representatives, shall be posted by it immediately upon receipt thereof, and be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 23, in writing, within 20 days from the date of receipt of this Order, what steps the Respondent has taken to comply herewith.

²⁴ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated at Washington, D.C. April 8, 1977

/s/ JERRY B. STONE
 Jerry B. Stone
 Administrative Law
 Judge

231 NLRB No. 50

FJP
 D-2782
 Shreveport, La.

UNITED STATES OF AMERICA
 BEFORE THE
 NATIONAL LABOR RELATIONS BOARD

FABSTEEL COMPANY OF LOUISIANA

and Case 23-CA-6008
 (formerly 15-CA-6059)

UNITED STEELWORKERS OF AMERICA, AFL-CIO

DECISION AND ORDER

On April 8, 1977, Administrative Law Judge Jerry B. Stone issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief supporting the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order,¹ as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Fabsteel Company of Louisiana, Shreveport, Louisiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified herein:

1. Delete the following from paragraphs 1(a) and (c):

"Except to the extent permitted by the proviso to Section 8(a)(3) of the Act."

¹ Since Louisiana is a right-to-work State, we shall delete references to the proviso to Sec. 8(a)(3) from the recommended Order and notice.

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. August 15, 1977

John H. Fanning, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FABSTEEL COMPANY OF LOUISIANA,
Respondent.

No. 77-3079.

United States Court of Appeals
Fifth Circuit

Jan. 10, 1979.

On Application for Enforcement of an Order of The
National Labor Relations Board.

Before RONEY, RUBIN and VANCE, Circuit Judges.

VANCE, Circuit Judge:

This case comes to us on the National Labor Relations Board's petition to enforce its order issued against Fabsteel Company of Louisiana (Fabsteel) on September 12, 1977.¹

The Board found that by virtue of its purchase of the Shreveport plant of Mosher Steel Company (Mosher), Fabsteel was a successor to Mosher with certain obligations under the National Labor Relations Act. The Board found that Fabsteel had violated Section 8(a)(3) and (1) of the Act by refusing to fulfill its obligation to remedy Mosher's unfair labor practices. The Board further found that Fabsteel had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the United Steelworkers of America, AFL-CIO (the Union). It ordered Fabsteel to cease and desist from refusing to bargain with the Union, ordered reinstatement of named employees with back pay and granted other relief.

Fabsteel presents two issues. (1) Whether a successor, within these facts, has the obligation to

¹ The Board's decision and order is reported at 231 N.L.R.B. No. 50.

remedy its predecessor's unfair labor practices by reinstating unfair labor practice strikers. (2) Whether a successor, within these facts, had an obligation to bargain with the Union which was certified as bargaining agent for employees of its predecessor.

The unfolding area of the law of successorship has been before the Supreme Court on several occasions. The first was in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). That holding was later described by the court as "properly cautious and narrow." *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union*, 417 U.S. 249, 254, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974). The development since *Wiley* has been on a case by case approach. In its most recent opinion, the Supreme Court stated:

Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate. The Court was obviously well aware of this in *Wiley*, as its guarded, almost tentative statement of its holding amply demonstrates.

Howard Johnson, supra, at 256, 94 S.Ct. at 2240. It is necessary, therefore, that we give particular attention to the facts in the case before us.

Factual History

On August 30, 1973, a company wide election was held at Mosher's seven plants.² The stipulated unit was all production and maintenance employees at all seven plants, including leadmen, truckdrivers, janitors, and plant clericals.

On January 18, 1974, the NLRB found that the stipulated unit was an appropriate one and that the Union had received a majority of the employees' votes. On that date the Board certified the Union as the exclusive representative of Mosher's employees in the bargaining unit.

On July 22, 1974, a strike involving a great majority of the employees in the unit commenced. At the Shreveport plant Mosher had approximately 67 employees in the unit on July 22. Sixty-five of those employees went out on strike. Mosher hired approximately 30 new employees and 21 of the strikers returned to work. The strike concluded at the Shreveport plant on May 12, 1975. On or about that same day, Mosher received unconditional offers from the strikers. None was reinstated at that time. Prior to December 31, 1975, however, seven employees were

² The seven plants consisted of plants located at: 3910 Washington and 6422 Esperson Street, Houston, Texas; San Antonio, Texas; Dallas, Texas; Lubbock, Texas; Tyler, Texas; and Shreveport, Louisiana. The case before us concerns incidents arising out of the Shreveport plant.

returned to work. Another five were refused reinstatement based on grounds of alleged misconduct.³

On September 16, 1975, the Board found⁴ that Mosher had engaged in conduct violative of Section 8(a)(5) and (1), and that the strike was an unfair labor practice strike caused and prolonged by Mosher's unfair labor practices. The Board ordered Mosher to bargain with the Union and to reinstate unfair labor practice strikers upon unconditional applications for reinstatement. We enforced this order on May 14, 1976. *Mosher Steel Co. v. NLRB*, 532 F.2d 1374 (5th Cir. 1976).

³ The Administrative Law Judge, whose opinion was adopted in full by the Board, specifically noted and took into consideration these five strikers as is evidenced by the following excerpt:

I officially note that the question of such misconduct's bearing on the five individual unfair labor practice strikers' right to reinstatement was litigated in a proceeding before Administrative Law Judge Jalette. The Board in *Mosher Steel Company*, 226 NLRB No. 180, found that Mosher Steel Shreveport unfair labor practice strikers Robert Wilkerson, Charles Stiles, and Benny Harris engaged in striker misconduct justifying a refusal to reinstate such employees. The conduct of Mosher Steel Company Shreveport unfair labor practice strikers Roosevelt Washington and Lee Taylor was found in effect to be of such a nature as not to impair their rights to reinstatement as unfair labor practice strikers, and it was found that the refusal to reinstate Washington and Taylor violated Section 8(a)(3) and (1) of the Act. Appropriate remedial order of reinstatement and backpay was issued in said decision on November 24, 1976.

⁴ The Board's Decision and Order is reported at 220 N.L.R.B. No. 47 (1975).

Enter Fabsteel

An agreement was entered on December 10, 1975, between Mosher and Fabsteel for sale to Fabsteel of the real estate, buildings, structures, machinery and equipment, tangible personal property, raw material and inventory, which constituted Mosher's Shreveport plant. At the time of the agreement, Fabsteel was aware of the Board's outstanding order against Mosher, and Fabsteel and Mosher had made arrangements concerning potential back pay and reinstatement obligations. Pursuant to this agreement, Mosher terminated its Shreveport operation on December 31, 1975, and Fabsteel commenced its operation on January 1, 1976. As of December 31 Mosher terminated its entire employee complement which consisted of 56 non-supervisory employees. On the same day Fabsteel took applications from all Mosher employees and hired all interested employees. It commenced operation with the identical employee complement that Mosher had prior to its termination.

By letter from its attorney on December 17, 1975, the Union notified Fabsteel of the Board's findings and order relating to Mosher's obligation to bargain and to the unfair labor practice strikers' rights to reinstatement. At that time the Union requested Fabsteel to bargain and to reinstate the strikers. At all times commencing on or about January 5, 1976, Fabsteel has refused to bargain with the Union or to reinstate the strikers.

Fabsteel admits that it is a successor for some purposes, but contends that it is not a successor in the sense of being obliged to remedy Mosher's unfair labor practices or to bargain with the Union. We disagree with both contentions.

The Successor's Obligation To Remedy Unfair Labor Practices

The Board found that Fabsteel violated Section 8(a)(3) and (1) of the Act by failing to reinstate 22 unfair labor practice strikers. The Board's determination⁵ that, at least, the 22 strikers involved here, were unfair labor practice strikers and were entitled to reinstatement by Mosher is not contested by Fabsteel. Under settled law, Mosher was obligated to rehire these strikers. *NLRB v. Safeway Steel Scaffolds Company of Georgia*, 383 F.2d 273 (5th Cir. 1967), cert. denied 390 U.S. 955, 88 S.Ct. 1052, 19 L.Ed.2d 1150 (1968). Fabsteel, however, contends that it has no obligation to reinstate the strikers.

The Board's finding that Fabsteel was a successor to Mosher with an obligation to reinstate the strikers was based on *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 94 S.Ct. 414, 38 L.Ed.2d 388 (1973), which affirmed the ninth circuit's enforcement⁶ of a Board order. In that case, All American Beverages, Inc. had acquired Golden

⁵ Mosher Steel Company, 220 N.L.R.B. No. 47 (1975).

⁶ *Golden State Bottling Co. v. NLRB*

State's business and continued the business without interruption or substantial change in operation, employee complement, or supervisory personnel. The Board found that since All American had acquired the business with knowledge of an outstanding Board order to reinstate with back pay a discharged employee, it was a successor for purposes of the Act and liable for the reinstatement of the discharged employee with back pay.

Fabsteel views the present Board holding as an overstatement of *Golden State*. It complains that the Board erred in making an initial determination that Fabsteel is a successor and then in automatically imposing all of Mosher's obligations on Fabsteel following such determination of successorship. Although we agree that such a two step approach would be inappropriate⁷ we do not agree that the result achieved by the Board in this case is incorrect.

⁷ The Court of Appeals stated that "[t]he first question we must face is whether Howard Johnson is a successor employer," 482 F.2d, at 492, and, finding that it was, that the next question was whether a successor is required to arbitrate under the collective-bargaining agreement of its predecessor, *id.*, at 494, which the court found was resolved by *Wiley*. We do not believe that this artificial division between these questions is a helpful or appropriate way to approach these problems. The question whether Howard Johnson is a "successor" is simply not meaningful in the abstract. Howard Johnson is of course a successor employer in the sense that it succeeded to operation of a restaurant and motor lodge formerly operated by the Grissoms. But the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative?

Golden State addressed the correct decisional process as follows:

The Board's decisional process in the *Perma Vinyl* line of cases has involved striking a balance between the conflicting legitimate interests of the bona fide successor, the public, and the affected employee. What we said of the Board's decisional process in another context is pertinent here:

"The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject

The answer to this inquiry requires analysis of the interests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 181, 94 S.Ct. 414, 423, 38 L.Ed.2d 388 (1973). *International Ass'n of Machinists v. NLRB*, 134 U.S.App.D.C. 239, 244, 414 F.2d 1135, 1140 (1969) (Leventhal, J., concurring); Goldberg, *The Labor Law Obligations of a Successor Employer*, 63 Nw.U.L.Rev. 735 (1969); Comment, *Contractual Successorship: The Impact of Burns*, 40 U.Chi.L.Rev. 617, 619 n. 10 (1973).

Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, supra, 417 U.S. at 263, n. 9, 94 S.Ct. at 2243 n. 9.

to limited judicial review." *NLRB v. Truck Drivers Local Union 449 International Brotherhood of Teamsters*, 353 U.S. [sic] 87, 96, 77 S.Ct. 643, 648, 1 L.Ed.2d 676 (1957).

The Board's *Perma Vinyl* principles introduced into the balancing process an emphasis upon protection for the victimized employee:

"Especially in need of help, it seems to us, are the employee victims of unfair labor practices who, because of their unlawful discharge, are now without meaningful remedy when title to the employing business operation changes hands." 164 N.R.L.B., at 969.

Golden State Bottling Co., supra, 414 U.S. at 181, 94 S.Ct. at 423. In the case before us the Board properly balanced the equities. Its findings are supported by the record and are therefore due to be enforced. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Fabsteel contends, however, that in balancing the equities the Board failed to take into consideration the fact that Mosher could reinstate these employees at other plants and that it also did not adequately consider the hardship that would be visited upon those employees hired to replace the strikers.

The first of these contentions was disposed of in the Administrative Law Judge's opinion, adopted in full by the Board:

Further evidence was offered and received to the effect that, in 1976, Mosher Steel offered certain of the unreinstated unfair labor practice strikers jobs at other Mosher Steel plants, with moving expenses. Certain of such employees accepted such reinstatement but advised Respondent, Fabsteel, that they desired reinstatement at the Shreveport plant. First, parties cannot by private agreements undermine the responsibilities to comply with the National Labor Relations Act or remedial orders of the Board. Secondly, offer of jobs away from the employing enterprise which is continuing does not constitute an offer of reinstatement which effectuates the purposes of the Act.¹⁹

¹⁹ See, *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605, and cases cited therein.

The Board's position finds support in cases involving reinstatement of strikers in other situations not involving successorships. See *NLRB v. Madison Courier, Inc.*, 153 U.S.App.D.C. 232, 472 F.2d 1307 (1972); *Florence Printing Co. v. NLRB*, 376 F.2d 216 (4th Cir.), cert. denied 389 U.S. 840, 88 S.Ct. 68, 19 L.Ed.2d 104 (1967).

The second contention is equally lacking in merit. We have recently held in a case not involving a successorship that unreinstated unfair labor practice strikers are entitled to reinstatement regardless of the fact that permanent replacements have been hired. *NLRB v. Pope Maintenance Corp.*, 573 F.2d 898 (5th Cir. 1978). We perceive no reason to change the law because a successor is involved. This is especially true when the successor has knowledge of an outstanding Board order requiring reinstatement.

The Successor's Obligation to Bargain

The second issue is whether substantial evidence on the record as a whole supports the Board's finding that Fabsteel had an obligation to bargain with the Union as a representative of its employees.

Fabsteel contends that it had doubt that the employees hired by it had an allegiance to the Union and a desire for representation by it. The employer relies on *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 92 S.Ct. 1571, 32 L.Ed.2d 61 (1972) and its holding that a successor has a right to refuse recognition of a union when it reasonably entertains a good faith doubt of such majority. *Id.* at 278-279, 92 S.Ct. 1571.

The Board found, however, that the certification was binding on Fabsteel and that it had no reasonable basis for a good faith doubt of the Union's majority status. It

found that Fabsteel's refusal to recognize and bargain with the Union was a violation of Section 8(a)(5) and (1) of the Act. *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270, 272 (5th Cir.), cert. denied, 423 U.S. 1016, 96 S.Ct. 449, 46 L.Ed.2d 387 (1975).

We agree that substantial evidence supports the finding of no reasonable ground for a good faith doubt of the Union's continuing majority status. Under *Universal Camera Corp. v. NLRB*, *supra*, this conclusion is sufficient for enforcement of the Board's order. Because of the novelty of the issue, however, we shall examine Fabsteel's contentions more closely than otherwise would be required.

Fabsteel contends that after recognizing that the unit had changed within the meaning of *Burns*, the Board relied on mathematics to find majority status and misapplied the arithmetic. Fabsteel argues that there necessarily has been a change in the bargaining unit because a seven plant unit was certified and it purchased only one of those seven plants.

The Board did not find that the unit had changed within the meaning of *Burns*:

Under the *Burns* doctrine, one of the factors for consideration as to a Respondent's obligation to bargain as a "successor" is whether there is a question as to majority status regard the Union. In this case, the certified bargain-

ing unit covered 7 plants geographically separated. Normally slight increases or decreases of employees in a bargaining unit are presumed [sic] not to affect the majority status of the representative. It would appear that the presumption of majority accorded a representative as to an overall unit of plants would be a presumption of equal distribution throughout the whole unit and that the presumption would apply equally as to the individual plants involved. Absent some evidence of employee dissatisfaction or change, such presumption would continue to constitute evidence of a majority status throughout the unit was [sic] well as in the separate parts of the overall unit.

We do not read *Burns*, as Fabsteel suggests, to exclude the present situation from control by the stated rule. The *Burns* court specified two such exclusions, neither of which encompassed our situation:

It would be a wholly different case if the Board had determined that because *Burns'* operational structure and practices differed from those of Wackenhut, the Lockheed bargaining unit was no longer an appropriate one. Likewise, it would be different if *Burns* had not hired employees already represented by a union certified as a bargaining agent But where the bargaining unit remains un-

changed and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of § 8(a)(5) and § 9(a) by ordering the employer to bargain with the incumbent union. This is the view of several courts of appeals and we agree with those courts. *NLRB v. Zayre Corp.*, 424 F.2d 1159, 1162 (CA5 1970); *Tom-A-Hawk Transit, Inc. v. NLRB*, 419 F.2d 1025, 1026-1027 (CA7 1969); *S. S. Kresge Co. v. NLRB*, 416 F.2d 1225, 1234 (CA6 1969); *NLRB v. McFarland*, 306 F.2d, [219] at 220.

Burns, supra, 406 U.S. at 280, 92 S.Ct. 1571, 1579 (footnotes omitted).

Fabsteel concedes that the Shreveport plant was a separate appropriate unit for bargaining. Although it was not obligated to do so,⁸ it chose to hire the identical employee complement. Our enforcement of the Board's order requiring Fabsteel to reinstate the unfair labor practice strikers makes it quite apparent that a majority of Fabsteel's employees after such reinstatement will be represented by the certified Union.

⁸ The Board has never held that the National Labor Relations Act itself requires that an employer who submits the winning bid for a service contract or who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer. *But cf. Chemrock Corp.*, 151 N.L.R.B. 1074 (1965). *NLRB v. Burns International Security Services, Inc.*, *supra*, at 406 U.S. 280 n.5, 92 S.Ct. at 1578 n.5.

From the holding in *Burns*, Fabsteel would have us extrapolate a rule that if there were a change in the certified unit no obligation to bargain would survive. Fabsteel does not attempt to state what type of change, if any, would merit such a conclusion. The Supreme Court has not given meaningful indication as to what specific type of change, if any, in a unit would warrant a refusal to bargain absent at least a good faith doubt as to the majority status of the Union's representation. A few courts have opined that changes, which are at least analogous to what Fabsteel contends is a change here, do not relieve a successor of its obligation to bargain with the Union. The Board has long held, with court approval, that under proper circumstances, the obligation to bargain with an incumbent union may be found although the work force is considerably diminished by the transfer. *See, e. g., NLRB v. Polytech, Inc.*, 469 F.2d 1226, 1230 (8th Cir. 1972); *NLRB v. McFarland*, 306 F.2d 219, 221 (10th Cir. 1962); *NLRB v. Armato*, 199 F.2d 800, 803 (7th Cir. 1952). The Board, with court approval, has similarly found a bargaining obligation though the transfer in ownership results in a division of the bargaining unit into two or more separate units, where, as here, each unit is independently appropriate. *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 880 (2nd Cir. 1977); *Zim's Foodliner, Inc. v. NLRB*, 495 F.2d 1131, 1141 (7th Cir.), *cert. denied* 419 U.S. 838, 95 S.Ct. 66, 42 L.Ed.2d 65 (1974); *N.L.R.B. v. Geronimo Service Co.*, 467 F.2d 903 (10th Cir. 1972); *Ranch-Way, Inc.*, 445 F.2d 625 (10th Cir. 1971), *vacated and remanded on other grounds*, 406 U.S. 940, 92 S.Ct. 2037, 32 L.Ed.2d 328 (1972). As the seventh circuit has stated,

Once it is determined that the successor unit is appropriate for bargaining, a change in unit definition, from large to smaller units, would seem not to raise any additional considerations beyond those [posed by a numerical diminution in unit size].

Zim's Foodliner, Inc. v. NLRB, supra, at 1141.

Finally, we do not agree that the Board's arithmetic was misapplied. By either of two approaches, the status of the Union's majority is not susceptible of a good faith doubt. Twenty-one of the 56 employees that Fabsteel had employed were strikers who had returned to work. No inference could be drawn that the employees who returned to work prior to the conclusion of the strike had abandoned the Union. *Nazareth Regional High School v. NLRB, supra* at 880. Seven of the 56 had been strikers who had been reinstated. Our arithmetic and the Board's adds up to 28 union employees, which is 50% of the employee complement. Since we have already concluded that Fabsteel was obligated to reinstate the 22 unfair labor practice strikers the 22 strike replacements could not be counted. *NLRB v. Frick Co.*, 423 F.2d 1327, 1334 (3rd Cir. 1970). The bottom line under this approach adds up to 28 out of 34, a clear majority.

The other approach similarly supports the Board's finding. The bargaining unit consisted of 78 employees. Fifty six of these employees were actually employed and an additional 22 are entitled to reinstatement.

Twenty eight of the 56 were union supporters who had been out on strike. Together with the 22 who are entitled to reinstatement this makes a total of 50 out of 78, again a clear majority.

ENFORCED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

No. 77-3079

FABSTEEL COMPANY OF LOUISIANA,
Respondent.

JUDGMENT

Filed: Feb. 1, 1979

Before: Roney, Rubin and Vance, Circuit Judges.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Fabsteel Company of Louisiana, Shreveport, Louisiana, its officers, agents, successors

and assigns on August 15, 1977. The Court heard argument of respective counsel on July 20, 1978 and has considered the briefs and transcript of record filed in this cause. On January 10, 1979, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Fabsteel Company of Louisiana, Shreveport, Louisiana, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

Costs are taxed against the respondent.

ENTERED: FEB. 1, 1979

ISSUED AS MANDATE: APR. 4, 1979

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ BRENDA HAUCK

Deputy

New Orleans, Louisiana

APR. 4, 1979